**SCHWAN-STABILO MARKETING SDN BHD & ANOR**
**v. S & Y STATIONERY & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUIT NO: 22IP-62-10-2014]
27 MARCH 2018

***CIVIL PROCEDURE:*** *Appeal – Appeal against decision of Deputy Registrar – Claim for relief regarding counterfeit goods based on trade mark infringement, tort of passing off and tort of unlawful interference with trade – Whether Deputy Registrar correct in law to award compensatory damages in form of royalty or loss of license fees based on 'user' principle – Whether Deputy Registrar should award further compensatory damages based on loss of business profits stemming from unlawful acts – Correct assessment of loss or damage to goodwill as result of passing off – Whether Deputy Registrar could draw adverse inference in assessments proceedings – Effect of adverse inference in assessment proceedings – Trade Marks Act 1976, ss. 35(1), 38(1)(a)*

The second plaintiff, a German company, was in the business of manufacturing and selling stationery products ('the second plaintiff's goods') bearing, *inter alia*, various forms of trade marks ('Stabilo trade marks'). The Stabilo trade marks have been registered in the second plaintiff's name under the Trade Marks Act 1976 ('the TMA'). The first plaintiff, a Malaysian company, was a subsidiary of the second plaintiff and was responsible for the distribution and sale of the second plaintiff's goods in Malaysia. The first defendant was a partnership consisting of two partners, namely the second and third defendants. The first defendant owed a sum of money to the first plaintiff in respect of the second plaintiff's goods supplied. ('the outstanding sum'). As the first defendant could not repay the outstanding sum, the first defendant returned a quantity of the purported second plaintiff's goods to the first plaintiff by way 'goods return note' ('returned goods'). However, the first plaintiff discovered that a part of the returned goods were counterfeit ('counterfeit goods'). The plaintiffs commenced a suit at the High Court against the defendants for, *inter alia*, relief regarding the counterfeit goods based on trade mark infringement, tort of passing off and tort of unlawful interference with trade ('the three causes of action'). After the trial, the High Court Judge ('the HCJ') allowed the suit and ordered, *inter alia*, (i) the defendants (a) disclose, to the plaintiffs, information on the defendants' goods which bore identical or similar marks as Stabilo trade marks and get-up as get-up of the second plaintiff's goods; and (b) hand over all records and relevant documents regarding the defendants' goods which had infringed Stabilo trade marks and/or passed off as the second plaintiff's goods ('infringing goods'); (ii) an assessment of compensatory damages to be paid by the defendants to the second plaintiff regarding the three causes of action; and (iii) the defendants shall pay to the second plaintiff interest at 5% per annum on the sum of assessed damages from the date of the first commission

of the three causes of action until full payment of the assessed damages. Pursuant to the HCJ's decision, the Deputy Registrar ('the DR') conducted an assessment of compensatory damages and ordered (i) the defendants pay RM13,820,000 as compensatory damages to the second plaintiff with interest at 5% per annum on that sum to be calculated from the date of the HCJ's decision, which was 23 February 2016, until the full settlement of that sum; and (ii) subject to an allocatur fee, costs amounting to RM15,000 paid by the defendants to the second plaintiff. Hence, the present appeal by the defendant against the DR's decision, pursuant to O. 56 r. 1(1) of the Rules of Court 2012 ('the ROC'). The issues that arose were (i) whether the DR was correct in law to award compensatory damages to the second plaintiff in the form of royalty or loss of license fees based on the 'user' principle; (ii) having awarded compensatory damages on the royalty basis, should the DR award further compensatory damages based on business profits that the second plaintiff had lost due to the defendants' unlawful acts; (iii) how should the court assess loss or damage to the second plaintiff's goodwill as a result of the defendants' passing off; and (iv) when the defendants did not comply with a mandatory order by the HCJ for the defendants to, *inter alia*, adduce documentary evidence in the assessment proceedings, whether the DR may draw an adverse inference against the defendants under s. 114(g) of the Evidence Act 1950 and, if so, what was the effect of such an adverse inference in the assessment proceedings.

**Held (allowing appeal; setting aside decision of Deputy Registrar):**

**(1)** The DR erred in accepting the second plaintiff's submission regarding royalty basis as the first defendant had purchased the second plaintiff's goods for re-sale to the public and retailers. Although the first defendant did not compete with the plaintiffs, the first defendant had dealt with the second plaintiff's goods, *albeit* counterfeit goods. There was also no evidence that the second plaintiff had issued any license in Malaysia for the use of Stabilo trade marks. The first plaintiff was a subsidiary of the second plaintiff and not its licensee. Accordingly, as between the royalty basis and lost profits basis, it was just and appropriate to apply the latter to compute compensatory damages. The DR also failed to consider a relevant fact in this appeal, namely, there was no evidence of the 'going rate' of the second plaintiff's purported license. (para 33)

**(2)** Section 35(1) of the TMA conferred on the second plaintiff an exclusive right to use the Stabilo trade marks. The sale of counterfeit goods by the first defendant did not infringe the Stabilo trade marks under s. 38(1)(a) of the TMA but such a trade mark infringement did not wholly deprive the second plaintiff of its exclusive right to use Stabilo trade marks under s. 35(1) of the TMA. In other words, despite the defendants' trade mark infringement, the second plaintiff still has an exclusive right to use Stabilo trade marks pursuant to s. 35(1) of the TMA. (para 33)

**(3)** The DR erred in accepting the defendants' sales of RM820,000 as loss of business profits suffered by the second plaintiff. The DR did not ascertain (i) the profit margin of the second plaintiff's goods, which were the subject matter of the counterfeit goods; (ii) the loss of sales of the second plaintiff's goods, which were the subject matter of the counterfeit goods, due to the defendants' wrong which constituted the three causes of action; and (iii) the loss of business profits suffered by the second plaintiff due to the third causes of action. (para 38)

**(4)** There was no evidence from any expert valuer regarding the value of the goodwill attached to the Stabilo trade marks. The defendants had only committed the tort of passing off regarding the second plaintiff's goods bearing Stabilo goodwill. There was also no expert evidence that there has been a dimunition in the value of Stabilo goodwill due to the defendants' passing off. The sum of RM463,192,544.36 is the total sales in Malaysia by the plaintiffs from 2003 to 2015. That sum does not represent the value of the second plaintiff's goodwill, let alone Stabilo goodwill. The DR had mistakenly assumed that the plaintiff's total sales constituted the value of goodwill. A sum of RM5,000,0000 for loss of the second plaintiff's goodwill amounted to an unjust enrichment for the second plaintiff and would financially destroy the defendants in an unjust manner. This was inconsistent with the *restitutio in integrum* principle and amounted to a punishment of the defendants. (para 40)

**(5)** The HCJ's decision was to order interest to be given from the date of the first commission of the three causes of action. Therefore, the DR erred in ordering interest on the sum of RM13,820,000 to commence from the date of the HCJ's decision until the date of full settlement of the same. (para 41)

**(6)** In view of the errors, the court had to re-assess compensatory damages to be paid by the defendants to the second plaintiff. It was just and appropriate to use lost profits basis in this case. Unfortunately for the second plaintiff, compensatory damages could not be computed by applying lost profits basis because the second plaintiff did not adduce any evidence regarding the profit margin of the second plaintiff's goods, which were the subject mater of the counterfeit goods, and the loss of sales of such goods due to the three causes of action. The second plaintiff was barred by O. 56 r. 1(3A) of the ROC from adducing any fresh evidence for this appeal. Based on ordinary business knowledge and common sense, loss of the second plaintiff's goodwill was assessed at RM300,000. (paras 45, 46 & 48)

**Case(s) referred to:**

*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***
*Dawama Sdn Bhd v. Mohd Fadel Yusof & Ors [2014] 1 LNS 803 HC* ***(refd)***
*Draper v. Trist & Ors [1939] 3 All ER 513* ***(refd)***
*Firm Bhagwan Dass Ramjilal, Iron Merchants and Golden Engineering Works v. Watkins Mayor & Co AIR 1956 Punjab 17* ***(refd)***
*General Tire & Rubber Co v. Firestone Tyre & Rubber Co Ltd [1975] 2 All ER 173* ***(refd)***
*Goo Sing Kar v. Dato' Lim Ah Chap & Ors [2013] 2 CLJ 936 CA* ***(refd)***
*Irvine v. Talksport Ltd [2003] FSR 35* ***(refd)***
*Kertih Port Sdn Bhd v. Pemunya Kapal "Shema" [2011] 3 CLJ 184 HC* ***(refd)***
*Lee Thye v. Societe Generale Cawangan Singapura [2010] 1 CLJ 170 CA* ***(refd)***
*Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2002] 5 CLJ 170 HC* ***(refd)***
*Mohamed Ibrahim & Anor v. Christopher Piff & Anor [1980] 1 LNS 139 FC* ***(refd)***
*Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors [2017] 1 LNS 1142 HC* ***(refd)***
*National Guild of Removers and Storers Ltd v. Silveria [2011] FSR 9* ***(refd)***
*Plomien Fuel Economiser Coy Ltd v. National School of Salesmanship Ltd [1943] 60 RPC 209* ***(refd)***
*Reed Executive Plc v. Reed Business Information Ltd [2004] RPC 40* ***(refd)***
*Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC* ***(refd)***
*Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC* ***(refd)***
*Siew Kong Engineering Works (sued as a firm) v. Lian Yit Engineering Sdn Bhd & Anor [1993] 2 SLR 505* ***(refd)***
*Taiping Poly (M) Sdn Bhd v. Wong Fook Toh & Ors [2011] 3 CLJ 837 FC* ***(refd)***
*Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC* ***(refd)***
*Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC* ***(refd)***
*Yenty Lily (trading as Access International Services) v. ACES System Development Pte Ltd [2012] SGHC 208* ***(refd)***

**Legislation referred to:**

Evidence Act 1950, ss. 2, 3, 106, 114(g)
Federal Constitution, art. 121(1)
Rules of Court 2012, O. 56 r. 1(1), (3A), O. 59 r. 8(b)
Trade Marks Act 1976, ss. 35(1), 38(1)(a)

The Evidence Act 1872 [Ind], ss. 106, 114(g)

*For appellants/defendants - Lai Kwan Kam; M/s KK Lai & Co*
*For respondent/2nd plaintiff - Kok Pok Chin & Ong Hong Keit; M/s PC Kok & Co*

*Reported by Najib Tamby*

## JUDGMENT
(encl. 45)

**Wong Kian Kheong JC:**

### Introduction

**[1]** This is an appeal by the defendants (defendants) against an assessment of compensatory damages conducted by the learned Deputy Registrar of the High Court (DR) pursuant to a judgment of the learned Azizah Nawawi J (after a trial).

**[2]** This appeal raises the following questions regarding assessment of compensatory damages:

(a) whether the learned DR was correct in law to award compensatory damages to the second plaintiff company (second plaintiff) in the form of loss of royalty or loss of license fees based on the "user" principle (royalty basis);

(b) having awarded compensatory damages on the royalty basis, should the learned DR award further compensatory damages based on business profits that the second plaintiff had lost due to the defendants' unlawful acts (lost profits basis)?;

(c) how should the court assess loss or damage to the second plaintiff's goodwill as a result of the defendants' passing off?; and

(d) when the defendants did not comply with a mandatory order by the learned judge for the defendants to, among others, adduce documentary evidence in the assessment proceedings, whether the learned DR may draw an adverse inference against the defendants under s. 114(g) of the Evidence Act 1950 (EA) and if so, what is the effect of such an adverse inference in the assessment proceedings?

**Background**

**[3]** The second plaintiff is a German company which manufactures and sells stationery products (second plaintiff's goods) bearing, among others, various forms of trade marks (Stabilo trade marks). The Stabilo trade marks have been registered in the second plaintiff's name under the Trade Marks Act 1976 (TMA).

**[4]** The first plaintiff company (first plaintiff), a Malaysian company, is a subsidiary of the second plaintiff. The first plaintiff distributes and sells the second plaintiff's goods in Malaysia.

**[5]** The first defendant (first defendant), a registered business, is a partnership consisting of two partners, namely the second and third defendants. The first defendant is in the wholesale and retail business of stationery products. The first defendant previously purchased the second plaintiff's goods from the first plaintiff for resale to retailers and the public.

**[6]** The first defendant owed a sum of money to the first plaintiff in respect of the second plaintiff's goods supplied by the first plaintiff to the first defendant (outstanding sum). As the first defendant could not repay the outstanding sum, the first defendant returned a quantity of purported second plaintiff's goods to the first plaintiff by way of "goods return note" dated 27 December 2013 (returned goods). The first plaintiff discovered that a part of the returned goods was counterfeit (counterfeit goods).

**[7]** The plaintiffs filed this suit against the defendants (this suit) for, among others, relief regarding the counterfeit goods based on trade mark infringement, tort of passing off and tort of unlawful interference with trade (three causes of action).

**[8]** After a trial, on 23 February 2016, Azizah Nawawi J allowed this suit and ordered as follows, among others:

(i) an order that the defendants shall:

(a) disclose to the plaintiffs in an affidavit all information regarding the defendants' goods which bore identical or similar:

– marks as Stabilo trade marks; and

– get-up as get-up of second plaintiff's goods; and

(b) hand over all records and relevant documents regarding the defendants' goods which had infringed Stabilo trade marks and/or passed off as second plaintiff's goods (infringing goods)

(post-trial discovery order);

(ii) an assessment of compensatory damages to be paid by the defendants to the second plaintiff regarding the three causes of action; and

(iii) the defendants shall pay to the second plaintiff interest at 5% per annum on the sum of assessed damages from the date of the first commission of the three causes of action until full payment of the assessed damages

(High Court's decision).

**[9]** The defendants did not appeal to the Court of Appeal against the High Court's decision.

**Assessment Of Compensatory Damages By DR**

**[10]** Pursuant to the High Court's decision, the learned DR conducted an assessment of compensatory damages and made the following order:

(a) the defendants shall pay a sum of RM13,820,000 as compensatory damages to the second plaintiff with interest at 5% per annum on that sum to be calculated from the date of the High Court's decision (23 February 2016) until full settlement of that sum; and

(b) subject to an allocatur fee, costs amounting to RM15,000 shall be paid by the defendants to the second plaintiff

(DR's decision).

**[11]** According to the written grounds for the DR's decision (DR's grounds):

(a) the learned DR applied the royalty basis and awarded a sum of RM8,000,000 to be paid by the defendants to the second plaintiff as royalty or license fee. This sum of RM8,000,000 consists of:

(i) an "upfront payment" of RM5,000,000 and

(ii) an annual royalty of RM3,000,000

for the second plaintiff to grant a license to the defendants to use Stabilo trade marks;

(b) the learned DR applied the lost profits basis and ordered the defendants to pay a sum of RM820,000 to the second plaintiff as loss of business profits suffered by the second plaintiff due to the defendants' unlawful acts regarding the three causes of action; and

(c) a sum of RM5,000,000 shall be paid by the defendants to the second plaintiff for the damage to the second plaintiff's goodwill.

**[12]** In court encl. no. 45 (this appeal), the defendants have appealed against DR's decision under O. 56 r. 1(1) of the Rules of Court 2012 (RC). In this judgment, I will refer to the parties as they are before the learned DR.

**Defendants Are Barred From Challenging High Court's Decision**

**[13]** In this appeal, the written submission of Mr Lai Kwan Kam, the defendants' learned counsel, had disputed that the defendants were liable to the second plaintiff for the three causes of action. As the defendants did not appeal to the Court of Appeal against the High Court's decision, the High Court's decision is therefore final and *res judicata*. Accordingly, the defendants cannot now deny their liability to the second plaintiff in respect of the three causes of action - please see Peh Swee Chin FCJ's judgment in the Supreme Court case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, at 791.

**How To Assess Compensatory Damages?**

**[14]** Firstly, this appeal concerns assessment of compensatory damages for the three causes of action. This judgment does not concern assessment of compensatory damages for other causes of action.

**[15]** Secondly, the United Kingdom (UK) has enacted the Intellectual Property (Enforcement, etc.) Regulations 2006 (IPR 2006) for infringement of intellectual property (IP) rights. Malaysia has no legislation equivalent to IPR 2006. Accordingly, UK cases decided on IPR 2006, have to be read with caution.

**[16]** Regarding reliance on previous cases on compensatory damages, I remind myself of the following:

(a) assessment of compensatory damages is not provided by written law. Hence, reference is made to case law. I must confess that I cannot reconcile all the cases regarding assessment of compensatory damages. Each case has its own peculiar facts and may be explained as such. In the Federal Court case of *Taiping Poly (M) Sdn Bhd v. Wong Fook Toh & Ors* [2011] 3 CLJ 837, at para. 19 (regarding assessment of damages for trade mark infringement and tort of passing off), Richard Malanjum CJ (Sabah & Sarawak) held as follows:

> *And while it is quite easy to state the general principle the mechanics of ascertaining damages actually sustained by the plaintiff are not simple to determine. There is no hard and fast rule to follow which is foolproof and universally accepted.*
>
> (See: *AG Spalding & Bros v. AW Gamage Ltd (supra)*; *Juggi Lal-Kamlapat & Juggilal-Kamplapat Mills of Cawnpore v. Swadeshi Company Ltd* [1929] 46 RPC 74; *Re Prince Manufacturing Inc and Tennisport Pty Limited v. Abac Corporation Australia Pty Limited and the Liquidator Management Australia Pty Limited Trading as the Liquidator* (*supra*)). **It depends on the facts of each case. It is basically facts driven**.
>
> (emphasis added); and

(b) cases on assessment of damages should only be referred to as the court's previous approach (not as a rule of law) in a similar factual situation. I cite Lord Wilberforce's judgment in the House of Lords case of *General Tire & Rubber Co v. Firestone Tyre & Rubber Co Ltd* [1975] 2 All ER 173, at 177, as follows:

> *Reported authorities, many of which were cited in argument, may be useful as illustrations of judicial reasoning, but are capable of misleading if decisions on a particular set of facts and observations in judgments leading up to such decisions are later relied on as establishing a rule of law. Nevertheless I think it useful to refer to some of the main groups of reported cases which exemplify the approaches of courts to typical situations.*
>
> (emphasis added).

*General Tire & Rubber Co* is a patent infringement case which has been applied in *Taiping Poly*, at para. 19.

**[17]** The general principle of *restitutio in integrum* applies in all assessments of compensatory damages, namely the amount of compensatory damages should as nearly as possible put the injured plaintiff in the same position as the plaintiff would have been in if the wrong has not been committed by the defendant - please see *Taiping Poly*, at paras. 8 and 19.

The court must ensure that a plaintiff is not unjustly enriched or overcompensated and at the same time the court should prevent a defendant from being financially ruined in an unjust manner - please see *Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors* [2017] 1 LNS 1142; [2017] 7 AMR 560, at sub-para. 75(2) (concerning among others, assessment of damages for tort of unlawful interference with trade). The object of compensatory damages is to compensate a plaintiff and not to punish a defendant - *General Tire & Rubber Co*, at p. 177.

*Lost Profits Basis*

**[18]** The lost profits basis is applied when a plaintiff is in the business of manufacture or sale of goods which competes with the defendant's goods - please see *Taiping Poly*, at para. 19. The lost profits basis computes the loss of the plaintiff's business profits caused by a diversion of the plaintiff's customers as a result of the defendant's misrepresentation - *Taiping Poly*, at para. 15.

**[19]** According to *Taiping Poly*, at paras. 19-36, the lost profits basis is applied in the following manner:

| | |
|---|---|
| Value of sales of plaintiff's goods (subject matter of trade mark infringement and/or passing off) (Specific Goods) | Figure A |
| Business profits (before tax) enjoyed by plaintiff regarding Specific Goods<br>Note:<br>1. Expenses regarding Specific Goods are taken into account to derive plaintiff's business profits.<br>2. Taxes are excluded from computation of plaintiff's business profits. | Figure B |
| Percentage of profit margin for Specific Goods | [Figure B/Figure A] × 100% = C% |
| Loss of sales of Specific Goods<br>- a comparison between volume of plaintiff's sales of Specific Goods before commission of the wrong and volume of plaintiff's sales of Specific Goods after the commission of the wrong | Figure D |
| Loss of business profits regarding Specific Goods suffered by plaintiff due to defendant's wrong | C% × Figure D = Figure E |

Based On *Taiping Poly:*

(a) a plaintiff has to exclude customers of the defendant who are not misled in making their purchase of the defendant's goods - *Taiping Poly*, at para. 19. There is no presumption that the infringing goods sold by a defendant, would have been sold by the plaintiff - *Taiping Poly*, at para. 17. In other words, a plaintiff has to prove actual loss of business profits due to the defendant's wrong;

(b) the amount of loss of sales of a plaintiff's goods (the subject matter of trade mark infringement or the tort of passing off) is not the plaintiff's loss of business profits. In *Taiping Poly*, at para. 23, the High Court Judge set aside the learned Senior Assistant Registrar's (SAR) assessment of compensatory damages based on the quantum of loss of sales by the plaintiff company. The High Court Judge's decision on this point had been affirmed by the Court of Appeal and Federal Court respectively;

(c) in applying loss profits basis, overhead expenses should be considered - *Taiping Poly*, at para. 31;

(d) taxes are excluded in the computation of a plaintiff's loss of business profits - *Taiping Poly*, at para. 31. In this regard, I am of the view that goods and services tax should not be included in the application of loss profits basis;

(e) the court has to ascertain the profit margin of a plaintiff's goods (the subject matter of trade mark infringement or the tort of passing off);

(f) figure E will be the loss of business profits suffered by a plaintiff due to the three causes of action; and

(g) loss of business profits should be assessed liberally - *Taiping Poly*, at para. 19.

*Royalty Basis*

**[20]** The royalty basis has been described as the "user" principle - please see Jacob LJ's judgment in the English Court of Appeal case of *Reed Executive Plc v. Reed Business Information Ltd* [2004] RPC 40, at para. 165 (a trade mark infringement case).

**[21]** My understanding of case law regarding the royalty basis is as follows:

(a) where a plaintiff has previously granted licenses to third parties for the use or exploitation of the plaintiff's IP rights, the court may use the royalty basis to assess the plaintiff's loss of royalty or license fee due to the defendant's infringement of the plaintiff's IP rights - please see Lord Wilberforce's judgment in *General Tire & Rubber Co*, at p. 178;

(b) a plaintiff is required to satisfy the court that there are "circumstances in which the going rate was paid are the same or at least comparable with those in which the patentee and the infringer are assumed to strike their bargain" - *General Tire & Rubber Co*, at p. 178;

(c) the court will determine what is a reasonable sum of royalty or license fee to be paid by a defendant to the plaintiff so as to enable the defendant to obtain lawfully that which the defendant has obtained unlawfully - please see Jonathan Parker LJ's judgment in the English Court of Appeal case of *Irvine v. Talksport Ltd* [2003] FSR 35, at 644 (a passing off case);

(d) a defendant's financial position is not relevant in the sense that the defendant cannot contend that the defendant is unable to pay a reasonable royalty or license fee imposed by the plaintiff in respect of the defendant's infringing acts - *Irvine*, at p. 644; and

(e) in *Reed Executive*, at para. 165, Jacob LJ decided as follows:

> *I am by no means convinced that the "user" principle automatically applies in trade mark or passing-off cases, especially where the "mark" concerned is not the sort of mark available for hire. The ordinary case is one that just protects goodwill. For damages to be awarded on the user principal is close to saying there is no damage so some will be invented. It is not the same sort of thing as having to pay for use of an invention (the basis of the user principal in patents).*
>
> (emphasis added).

In the English High Court case of *National Guild of Removers and Storers Ltd v. Silveria* [2011] FSR 9, Deputy High Court Judge Birss J QC (as he then was) applied the royalty basis in a suit concerning trade mark infringement and passing off. It is to be noted that in *National Guild of Removers and Storers*, the English Court of Appeal case of *Reed Executive* was however not referred to.

Furthermore, judgments in default of appearance had been obtained by the claimant in *National Guild of Removers and Storers* and the English High Court did not therefore have the benefit of submission by the defendants in that case.

*Cases Where Both Lost Profits And Royalty Bases Do Not Apply*

**[22]** In cases where neither lost profits basis nor royalty basis is applicable, Lord Wilberforce held as follows in *General Tire & Rubber Co*, at pp. 178-179:

> *In some cases it is not possible to prove either (as in 1) that there is a normal rate of profit, or (as in 2) that there is a normal, or established, licence royalty. Yet clearly damages must be assessed. In such cases it is for the plaintiff to adduce evidence which will guide the court. This evidence may consist of the practice, as regards royalty, in the relevant trade or in analogous trades; perhaps of expert opinion expressed in publications or in the witness box; possibly of the profitability of the invention; and any other factor on which the judge can decide the measure of loss. Since evidence of this kind is in its nature general and also probably hypothetical, it is unlikely to be of relevance, or if relevant of weight, in the face of the more concrete and direct type of evidence referred to under (2). But there is no rule of law which prevents the*

*court, even when it has evidence of licensing practice, from taking these more general considerations into account. The ultimate process is one of judicial estimation of the available indications.*

(emphasis added).

*Loss Of Goodwill*

**[23]** In addition to loss of business profits or loss of royalty/license fee due to the three causes of action:

(a) the court will presume that there is loss of goodwill to a plaintiff due to the defendant's commission of the tort of passing off - *Taiping Poly*, at para. 37;

(b) it is an exercise of the court's discretion to award a sum for damage to a plaintiff's goodwill due to the defendant's passing off - *Taiping Poly*, at para. 37; and

(c) in *Draper v. Trist & Ors* [1939] 3 All ER 513, at 524, Wilfred Greene MR (as he then was) held in the English Court of Appeal that the court would use "ordinary business knowledge and common sense" in assessing loss of goodwill due to passing off.

*Evidential Burden And Adverse Inference*

**[24]** A plaintiff has the evidential onus to prove loss which naturally flows from the defendant's unlawful act - *Taiping Poly*, at para. 17. If a plaintiff has failed to discharge the burden to prove any loss or damage, the plaintiff can only claim nominal damages - please see the judgment of Edgar Joseph Jr FCJ in the Federal Court case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777, at 799 (breach of contract case).

**[25]** In this case, the learned DR held that the defendants did not comply with the post-trial discovery order by not adducing any evidence regarding the infringing goods. Consequently, the learned DR accepted the following submission by Mr Kok Pok Chin, the second plaintiff's learned counsel:

(a) the defendants had all the relevant records regarding the infringing goods. Accordingly, the defendants had the legal onus under s. 106 of the EA to produce all relevant evidence concerning the infringing goods and upon the defendants' failure to do so, an adverse inference under s. 114(g) of the EA was drawn by the learned DR against the defendants in the assessment proceedings;

(b) Mr Kok cited Bishan Narain J's judgment in the Punjab High Court in *Firm Bhagwan Dass Ramjilal, Iron Merchants and Golden Engineering Works v. Watkins Mayor & Co* AIR 1956 Punjab 17, at 19 (passing off action), which decided as follows:

*In the present case the defendants refused to produce their books of account showing the quantities of goods manufactured or sold by them during this period and the profits earned thereon. It was their duty to produce their account books as the matter was entirely within their special and exclusive knowledge vide s. 106 [of the Indian Evidence Act 1872].*

*It is impossible to believe that they were not keeping any account books at all relating to their factory. Therefore, every presumption must be raised against them. The trial Court has calculated the profit of each knife at 20 per cent ...*

*... In any case the defendants must thank themselves if a presumption has been raised against them as they did not produce all the evidence that was within their control and knowledge. I, therefore, see no reason to interfere with the amount of damages fixed by the trial Court.*

(emphasis added); and

(c) Mr Kok also relies on Greene MR's judgment in the English Court of Appeal case of *Plomien Fuel Economiser Coy Ltd v. National School of Salesmanship Ltd* [1943] 60 RPC 209, at 215 (passing off suit).

**[26]** The question that arises is what is the effect of an adverse inference made against a defendant under s. 114(g) of the EA in proceedings to assess compensatory damages? Can the court rely on an adverse inference to justify an amount of damages claimed by a plaintiff?

**[27]** Sections 106 and 114(g) of the EA provide as follows:

Burden of proving fact especially within knowledge

s. 106. **when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him**.

Court may presume existence of certain fact

s. 114. **the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct**, and public and private business, **in their relation to the facts of the particular case**.

ILLUSTRATIONS

**The court may presume:**

**...**

**(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it; ...**

(emphasis added).

**[28]** Our ss. 106 and 114(g) of the EA are identical to ss. 106 and 114(g) of the Indian Evidence Act 1872.

**[29]** Firstly, s. 106 of the EA only provides who has the onus to prove any fact which is within a person's knowledge. Section 106 of the EA does not allow a court to order any amount of damages claimed by a plaintiff merely

because the defendant has failed to comply with a court order to adduce all relevant evidence regarding assessment of compensatory damages. *Bhagwan Dass Ramjilal*, at p. 19, can be easily explained on the ground that the plaintiffs in that case had adduced evidence regarding their loss due to the defendants' passing off.

**[30]** Section 114(g) of the EA only provides that if evidence could be produced by a person (X) and such evidence is however not produced by X, the court may presume that the production of such evidence would be unfavourable to X. *Plomien Fuel Economiser Coy* does not concern s. 114(g) of the EA because there is no UK statute which is equivalent to EA. Furthermore, the English Court of Appeal did not rely on the defendants' failure to adduce relevant evidence to justify the assessment of compensatory damages for the tort of passing off.

**[31]** I am of the following view regarding the application of s. 114(g) of the EA in proceedings to assess compensatory damages:

(a) s. 2 of the EA allows the application of EA, including s. 114(g) of the EA, in proceedings to assess compensatory damages. This is because assessment proceedings clearly fall within the words "judicial proceedings in or before any court" in s. 2 of the EA. Section 3 of the EA defines the word "court" as a court established by or under Part IX of the Federal Constitution (Constitution). Article 121(1) of the Constitution (which falls in Part IX of the Constitution) concerns the High Court (where compensatory damages are assessed);

(b) even if an adverse inference is drawn against a defendant in assessment proceedings, the plaintiff still has the evidential burden to prove compensatory damages - *Taiping Poly*, at para. 17. Such an evidential burden on a plaintiff, does not shift to the defendant merely because an adverse inference has been made against the latter under s. 114(g) of the EA. Accordingly, if a plaintiff has failed to adduce any evidence regarding the loss or damage suffered by the plaintiff due to the three causes of action, even if the defendant has been guilty of conduct which attracts an adverse inference, the court must find that the plaintiff has failed to discharge the evidential burden to prove any loss or damage and the plaintiff is therefore only entitled to nominal damages - please see *Tan Sri Khoo Teck*, at p. 799; and

(c) if evidence has been adduced in assessment proceedings regarding the loss or damage suffered by a plaintiff due to the three causes of action and there are two or more inferences which may be drawn by the court based on such evidence, the court may rely on an adverse inference under s. 114(g) of the EA against a defendant to justify drawing a particular inference regarding the evidence which has been suppressed by the defendant.

**Whether DR Could Apply Royalty Basis In This Case**

**[32]** According to the DR's grounds:

(a) the learned DR did not apply loss profits basis because the first defendant did not compete with the plaintiffs;

(b) the defendants had been ordered by the learned DR to pay the second plaintiff for loss of royalty or license fees because the first defendant had interfered with the second plaintiff's exclusive use of Stabilo trade marks under s. 35(1) of the TMA. Reliance had been placed by the learned DR on *Irvine* and *National Guild of Removers and Storers*; and

(c) the learned DR accepted the plaintiffs' evidence as follows:

(i) if the defendants were to take up a license from the second plaintiff to manufacture and sell products bearing Stabilo trade marks in Malaysia, the second plaintiff would charge an upfront payment of RM5 million and an annual minimum royalty of RM3 million; and

(ii) a draft license agreement was adduced by the plaintiffs (draft license). The draft license provided that the second plaintiff would grant a licensee the right to use Stabilo trade marks in relation to the second plaintiff's goods to be distributed and marketed in Malaysia.

**[33]** With respect, the learned DR had erred in accepting Mr Kok's submission regarding royalty basis (first error) because:

(a) the first defendant had purchased the second plaintiff's goods for resale to the public and retailers. Although the first defendant did not compete with the plaintiffs, the first defendant had dealt with the second plaintiff's goods, *albeit* counterfeit goods. There is also no evidence that the second plaintiff has issued any license in Malaysia for the use of Stabilo trade marks - please see *General Tire & Rubber Co*, at p. 178. The first plaintiff is a subsidiary of the second plaintiff and is not its licensee. Accordingly, as between the royalty basis and lost profits basis, it is just and appropriate to apply the latter to compute compensatory damages;

(b) the learned DR's attention was not drawn to the English Court of Appeal case of *Reed Executive* which had expressed doubts on the application of royalty basis in trade mark infringement and passing off cases where the mark in question is not available for hire;

(c) the learned DR had failed to consider a relevant fact in this appeal, namely there was no evidence of the "going rate" of the second plaintiff's purported license - please see *General Tire & Rubber Co*, at p. 178. The learned DR had also omitted to take into account the "circumstances in which the going rate was paid are the same or at least comparable with those in which the patentee and the infringer are assumed to strike their bargain" as laid down in *General Tire & Rubber Co*, at p. 178. It is to be noted that the draft license granted the right to

use Stabilo trade marks in relation to the second plaintiff's goods to be distributed and marketed in Malaysia. The learned DR had failed to consider that the first defendant is not in the business of manufacture and marketing of the second plaintiff's goods bearing Stabilo trade marks in Malaysia. The first defendant only purchased the second plaintiff's goods for re-sale to the public and retailers;

(d) even if the royalty basis is invoked in this case, the learned DR should have only imposed a reasonable sum of royalty or license fee - please see *Irvine*, at p. 644. There is nothing to justify the imposition of RM5,000,000 as an upfront payment. No case has been cited by Mr Kok where the royalty basis allows an upfront payment to be allowed as part of compensatory damages. More importantly, a total sum of RM8,000,000 for the use of the second plaintiff's purported license, in my view, amounts to overcompensation for the second plaintiff and will financially cripple the defendants in an unjust manner - please see *Motordata Research Consortium*, at sub-para. 75(2). Such an exorbitant sum for the second plaintiff's purported license is contrary to the *restitutio in integrum* principle and amounts to a punishment of the defendants - please see *General Tire & Rubber C*o, at p. 177;

(e) section 35(1) of the TMA confers on the second plaintiff an exclusive right to use Stabilo trade marks. The sale of counterfeit goods by the first defendant did infringe the Stabilo trade marks under s. 38(1)(a) of the TMA but such a trade mark infringement did not wholly deprive the second plaintiff of its exclusive right to use Stabilo trade marks under s. 35(1) of the TMA. In other words, despite the defendants' trade mark infringement in this case, the second plaintiff still has an exclusive right to use Stabilo trade marks pursuant to s. 35(1) of the TMA. If I have accepted Mr Kok's submission regarding s. 35(1) of the TMA and the learned DR's decision on this point, any trade mark infringement will result in an unjust and astronomical sum of compensatory damages!; and

(f) the learned DR should have distinguished the following cases:

(i) in *Irvine*, the first claimant was a motor-racing driver who charged endorsement fees for his endorsement of products to be sold to the public. As such, the English Court of Appeal awarded damages based on the royalty basis against the defendant company which had supplied promotion packs to the defendant company's potential advertisers based on an image of the first claimant holding a portable radio with the defendant company's name. The first claimant in *Irvine* did not manufacture and sell goods with his registered trade marks; and

(ii) in *National Guild of Removers and Storers*, the claimant owns registered trade marks which have been licensed to the claimant's members. The defendants in *National Guild of Removers and Storers* had used the claimant's name and trade marks without any authorisation from the claimant. In *National Guild of Removers and Storers*, the claimant does not manufacture or sell goods. Accordingly, the English High Court invoked the royalty basis in that case. As explained above, the English Court of Appeal case of reed executive was not referred to in *National Guild of Removers and Storer*. More importantly, the court in *National Guild of Removers and Storer* did not have the benefit of submission by the defendants in that case because default judgments had already been obtained against the defendants.

**[34]** Mr Kok had made a startling submission - the statement of claim (SOC) in paras. 37 and 45 had pleaded that the second plaintiff had not granted any license to the defendants to use the Stabilo trade marks. According to Mr Kok, the defendants were bound by the "measure of damages based on loss of license/user basis" as pleaded in the SOC. Mr Kok cited the Federal Court's judgment in *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLJ 492. The learned DR accepted this submission in para. 91 of the DR's grounds. With respect, the learned DR has misconceived the object and effect of pleadings (second error). A pleading only binds the party who has filed the pleading. The SOC in this case only binds the plaintiffs but not the defendants. Neither *Saiman bin Umar* nor any case has laid down the proposition of law that a SOC binds a defendant.

**Did Learned DR Err In Awarding RM820,000 As Loss Of Sales?**

**[35]** Mr Kok submitted that the learned DR should award three different types of compensatory damages for the three causes of action. According to Mr Kok, a total of RM31,460,000 as compensatory damages should be paid by the defendants to the second plaintiff as follows:

(a) as compensatory damages for trade mark infringement:

(i) RM8,000,000 for loss of royalty or license fees; and

(ii) RM820,000 as the defendants' sale of counterfeit goods;

(b) as compensatory damages for the tort of passing off:

(i) RM8,000,000 for loss of royalty or license fees;

(ii) RM820,000 as the defendants' sale of counterfeit goods; and

(iii) RM5,000,000 for damage to the second plaintiff's goodwill; and

(c) as compensatory damages for the tort of unlawful interference with trade:

(i) RM8,000,000 for loss of royalty or license fees; and

(ii) RM820,000 as the defendants' sale of counterfeit goods.

**[36]** The learned DR accepted the above submission and decided that in addition to RM8,000,000 as damages for loss of royalty or license fee for trade mark infringement, an additional sum of RM820,000 was awarded by the learned DR as compensatory damages for the second plaintiff's loss of business profits on the following grounds:

(a) the defendants' sale of counterfeit goods amounted to RM820,000;

(b) the sum of RM820,000 represents the second plaintiff's loss of business profits in this case; and

(c) the defendants had breached the post-trial discovery order and had suppressed material evidence regarding the infringing goods. Accordingly, the court should draw an adverse inference against the defendants under s. 114(g) of the EA and award RM820,000 as compensatory damages for the second plaintiff's loss of business profits.

**[37]** In the Federal Court case of *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749, at paras. 12 and 14, Jeffrey Tan FCJ has explained that if a "cause of action" is proven by a plaintiff, this entitles the plaintiff to relief from the court. The number of causes of action does not determine the nature and quantum of relief to be granted by the court. With respect, the learned DR has fallen into error by acceding to Mr Kok's contention that the court should award three different types of compensatory damages for the three causes of action (third error). Irrespective of the number of causes of action, the object of compensatory damages is to restore the second plaintiff, as far as possible, to the position as if the defendants have not committed the wrong in this case - please see *Taiping Poly*, at paras. 8 and 19.

**[38]** I find that the learned DR has erred in accepting the defendants' sales of RM820,000 as loss of business profits suffered by the second plaintiff (fourth error). The fourth error has ignored the lost profits basis laid down by the Federal Court in *Taiping Poly*, at paras. 19-36, because the learned DR did not ascertain the following:

(a) the profit margin of the second plaintiff's goods (which were the subject matter of the counterfeit goods);

(b) the loss of sales of the second plaintiff's goods (which were the subject matter of the counterfeit goods) due to the defendants' wrong which constituted the three causes of action; and

(c) the loss of business profits suffered by the second plaintiff due to the three causes of action.

It is to be emphasised that in *Taiping Poly*, at para. 23, the High Court Judge set aside the learned SAR's assessment of compensatory damages based on the quantum of loss of sales by the plaintiff company.

**Whether Learned DR Was Right To Impose RM5 Million As Loss Of Goodwill**

**[39]** Regarding the tort of passing off, the learned DR accepted Mr Kok's contention and assessed RM5,000,000 as loss of the second plaintiff's goodwill. According to Mr Kok, the Federal Court awarded RM50,000 as damages for loss of goodwill in *Taiping Poly*. This sum of RM50,000 constituted 0.13% of the total sales of the plaintiff company in *Taiping Poly*. Mr Kok submitted that the total sales of the plaintiffs in this case is RM463,192,544.36. Taking the 0.13% approach in *Taiping Poly*, the second plaintiff would have suffered a loss of goodwill of RM60,215,030.77 (0.13% of RM463,192,544.36). The second plaintiff was prepared to accept RM5,000,000 as damages for its loss of goodwill in this case.

**[40]** I am of the view that the learned DR had erred in assessing damage to the second plaintiff's goodwill to be RM5,000,000 (fifth error). This decision is premised on the following reasons:

(a) there is no evidence from any expert valuer regarding the value of the goodwill attached to the Stabilo trade marks (Stabilo goodwill). The defendants had only committed the tort of passing off regarding the second plaintiff's goods bearing Stabilo goodwill. There is also no expert evidence that there has been a dimunition in the value of Stabilo goodwill due to the defendants' passing off;

(b) the sum of RM463,192,544.36 is the total sales in Malaysia by the plaintiffs from 2003 to 2015. That sum does not represent the value of the second plaintiff's goodwill, let alone Stabilo goodwill. The learned DR had mistakenly assumed that the plaintiffs' total sales constituted the value of goodwill;

(c) *Taiping Poly* did not lay down any mathematical approach. Such a mathematical approach is contrary to the court's assessment of loss of goodwill based on "ordinary business knowledge and common sense" - please see *Draper*, at p. 524; and

(d) a sum of RM5,000,000 for loss of the second plaintiff's goodwill amounts to an unjust enrichment for the second plaintiff and will financially destroy the defendants in an unjust manner - please see *Motordata Research Consortium*, at sub-para. 75(2). This is inconsistent with the *restitutio in integrum* principle and amounts to a punishment of the defendants - please see *General Tire & Rubber Co*, at p. 177.

**Whether DR Could Order Interest To Commence From A Date Which Was Contrary To High Court's Decision**

**[41]** The learned DR had ordered interest on the sum of RM13,820,000 to commence from the date of the High Court's decision (23 February 2016) until the date of full settlement of the same. I am of the view that the learned DR has erred in doing so (sixth error) because the High Court's decision had ordered interest to be given from the date of the first commission of the three causes of action.

**[42]** At the hearing of this appeal, I inquired from Mr Lai and Mr Kok on whether they agreed that the date of the first commission of the three causes of action was 27 December 2013, the day of the return of the counterfeit goods by the first defendant to the first plaintiff. Both Mr Lai and Mr Kok confirmed as such.

**Whether Appellate Intervention Is Warranted In This Case**

**[43]** I am aware that an appellate court is reluctant to intervene in the exercise of judicial discretion by a court of first instance in the assessment of compensatory damages - please see Mohamad Ariff J's (as he then was) judgment in the Court of Appeal case of *Goo Sing Kar v. Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936; [2013] 3 MLJ 374, at paras. 29-31. An appellate court is however duty-bound to intervene with regard to the assessment of compensatory damages in the following circumstances as explained by the Federal Court in *Tan Sri Khoo Teck Puat*, at pp. 31-32 (CLJ); p. 799 (MLJ):

> *We need hardly add that in considering this appeal, and in particular, the grounds upon which an appellate court would be justified in interfering by reassessment of the damages, we have reminded ourselves of what Greer LJ had said in Flint v. Lovell* [1935] 1 KB 354 at p 360 He said:
>
> > *... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.*
>
> *In other words, the two situations in which an appellate court would be justified in interfering by reassessment of the damages would be where the trial judge has acted on a wrong principle or has made an entirely erroneous estimate of the damages.*
>
> (emphasis added).

**[44]** I am of the view that appellate intervention is justified in this appeal because:

(a) the first to fifth errors have clearly shown that the learned DR had relied on the wrong principles of law;

(b) by reason of the first to fifth errors, the learned DR's assessment is "so extremely high" and constitutes an "entirely erroneous estimate of the damages" – please see *Tan Sri Khoo Teck Puat*, at p. 799;

(c) the sixth error is contrary to the High Court's decision; and

(d) the first to sixth errors (six errors) have caused a grave injustice to the defendants.

**Reassessment**

**[45]** In view of the six errors, this court has to reassess compensatory damages to be paid by the defendants to the second plaintiff - please see *Tan Sri Khoo Teck Puat*, at p. 799.

**[46]** For reasons explained in the above sub-paras. 33(a) and (b), it is just and appropriate to use lost profits basis in this case. Unfortunately for the second plaintiff, I cannot compute compensatory damages by applying lost profits basis because the second plaintiff did not adduce any evidence regarding the profit margin of the second plaintiff's goods (which were the subject matter of the counterfeit goods) and the loss of sales of such goods due to the three causes of action. The second plaintiff is now barred by O. 56 r. 1(3A) of the RC from adducing any fresh evidence for this appeal - please see Abu Samah JCA's (as he then was) judgment in the Court of Appeal in *Lee Thye v. Societe Generale Cawangan Singapura* [2010] 1 CLJ 170, at paras. 6, 14, 15 and 20. Order 56 r. 1(3A) of the RC provides as follows:

> 1(3A) *At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that*:
>
> (a) *at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and*
>
> (b) *the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.*
>
> (emphasis added).

**[47]** Based on the reasons elaborated in the above para. 46, I am constrained to find that the second plaintiff has failed to discharge its evidential burden to prove its loss of business profits due to the three causes of action. Such a finding is made despite the fact that the defendants have breached the post-trial discovery order and have suppressed material evidence regarding the infringing goods (which attracts an adverse inference against the defendants pursuant to s. 114(g) of the EA).

**[48]** As regards loss of the second plaintiff's goodwill, I acknowledge that Stabilo trade marks are world-renowned. As held in *Taiping Poly*, at para. 37, the court will presume that there is damage to the second plaintiff's goodwill due to the defendants' passing off. Based on "ordinary business knowledge and common sense", I assess loss of the second plaintiff's goodwill as RM300,000 - please see *Draper*, at p. 524.

**[49]** The defendants have ultimately succeeded in this appeal but I will not award them any costs as they have deliberately breached the post-trial discovery order and have suppressed material evidence regarding the infringing goods. A party's unlawful conduct may deprive the party of costs - please see O. 59 r. 8(b) of the RC and *Dawama Sdn Bhd v. Mohd Fadel Yusof & Ors* [2014] 1 LNS 803; [2015] 7 MLJ 1, at para. 25. In view of the defendants' improper conduct in this case, I order the defendants to pay RM10,000 as costs to the second plaintiff for the assessment proceedings before the learned DR and for this appeal.

**Other Cases Cited By Mr Lai And Mr Kok**

**[50]** The following cases cited by both learned counsel in this appeal did not concern the three causes of action:

(a) *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 and *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2002] 5 CLJ 170 concerned breaches of contracts;

(b) *Mohamed Ibrahim & Anor v. Christopher Piff & Anor* [1980] 1 LNS 139; [1980] 1 MLRA 131 was a negligence suit;

(c) in *Kertih Port Sdn Bhd v. Pemunya Kapal "Shema"* [2011] 3 CLJ 184; [2010] 2 MLRH 451, the court assessed cost incurred in respect of the arrest of a ship;

(d) *Siew Kong Engineering Works (sued as a firm) v. Lian Yit Engineering Sdn Bhd & Anor* [1993] 2 SLR 505 concerned measure of damages for the tort of conversion (which are very different from assessment of compensatory damages for the three causes of action); and

(e) in *Yenty Lily (trading as Access International Services) v. ACES System Development Pte Ltd* [2012] SGHC 208, the Singapore High Court assessed damages for breach of a contract and the tort of wrongful detention of property.

**Conclusion**

**[51]** Premised on the above reasons, this appeal is allowed with the following order:

(a) the DR's decision is set aside;

(b) the defendants shall pay a sum of RM300,000 as damages to the second plaintiff with interest at 5% per annum on that sum to be calculated from 27 December 2013 until the date of full settlement of that sum; and

(c) subject to an allocatur fee, the defendants shall pay RM10,000 as costs to the second plaintiff for the assessment proceedings before the learned DR and for this appeal.

**[52]** This is an assessment of compensatory damages where the second plaintiff has attempted to profit unjustly (at the expense of the defendants) by claiming a total of RM31,460,000 as compensatory damages. In such an unjust enrichment attempt, the second plaintiff has failed to discharge the evidential burden to prove its own loss of business profits due to the three causes of action.